

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

MARK GRANT,
Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,
District Director; and
BUREAU OF IMMIGRATION AND CUSTOMS
ENFORCEMENT,
Respondents.

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Civil Action No.
3:04 CV 1528 (CFD)

RULING ON HABEAS CORPUS PETITION

Pending are petitioner Grant's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 and motion for leave to proceed in forma pauperis. The petitioner, who is currently incarcerated at the State of Connecticut Enfield Correctional Institution, is subject to an immigration detainer lodged by the Department of Homeland Security's Bureau of Immigration and Customs Enforcement ("BICE"). Petitioner claims that the failure of BICE expeditiously to issue a final order of deportation after lodging such a detainer violates his rights to procedural due process, as guaranteed by the Fifth Amendment to the United States Constitution. The respondents have filed their opposition to the petition for writ of habeas corpus, claiming that the Court lacks jurisdiction over petitioner's habeas claims since he is not currently in custody of BICE. For the reasons below, the petition for writ of habeas corpus is dismissed and the motion for leave to proceed in forma pauperis is denied.

I. Background

The petitioner, Mark Grant, is a 23-year-old citizen and native of Jamaica. On January 30, 2004, he was convicted in the Connecticut state courts of sale of narcotics or amphetamines

by a non-dependent person. Grant was sentenced to five years in prison, and his term is due to expire on February 21, 2008. On May 8, 2003 (while Grant was in pre-trial state custody), the Immigration and Naturalization Service (“INS”) lodged an immigration detainer with the warden of the prison where Grant was then housed, stating that it had initiated an investigation to determine whether Grant was subject to removal from the United States.¹ That detainer remains lodged against Grant, and BICE admits that it intends to conduct removal proceedings against him at some point in the future.

Grant concedes that he qualifies as a deportable alien under 8 U.S.C. § 1227(a)(2)(A)(iii), as he has been convicted of an aggravated felony. Nor does he challenge any such deportation. Grant argues, however, that according to the terms of 8 U.S.C. § 1228, he is entitled to expedited removal and that he is being unlawfully confined due to BICE’s failure to enter a final order of removal in his case. Specifically, Grant argues that under Conn. Gen. Stat. § 54-125d, he could receive deportation parole on his state sentence as early as August 21, 2005, but that he will not be eligible for such parole until BICE has issued him a final order of deportation.

II. Discussion

A writ for habeas corpus challenging present physical confinement must be brought against the petitioner’s “immediate custodian.” Rumsfeld v. Padilla, 124 S. Ct. 2711, 2718 (U.S. Jun. 28, 2004); see also Braden v. 30 th Judicial Circuit Court of Kentucky, 410 U.S. 484, 494-95 (1973) (holding that writ of habeas corpus properly lies against “the person who holds [the

¹ On March 1, 2003, the INS was abolished and its functions transferred to three bureaus within the Department of Homeland Security. The immigration enforcement of INS were transferred to the Bureau of Immigration and Customs Enforcement within the Department of Homeland Security, who are the named respondents in this action.

detainee] in what is alleged to be unlawful custody”). As Grant is incarcerated at a Connecticut state facility, the federal officials named as respondents here are not the persons currently holding him. Although the Second Circuit has yet to resolve the issue, most federal appeals courts have held that “the filing of a detainer, alone, does not create custody in the INS.” Simmonds v. INS, 326 F.3d 351, 354 (2d Cir. 2003) (noting that “the majority of circuits” have adopted this view when an immigrant is subject to detainer but is not yet subject to a final order of removal). The circumstances of Grant’s confinement weigh against determining that the named respondents qualify as his “immediate custodians.”

Moreover, even if the respondents were deemed to qualify as Grant’s custodians for the purposes of his habeas petition, Grant’s claim fails on its merits. Although Grant qualifies for “expedited removal” under 8 U.S.C. § 1228, that does not mean he immediately is entitled to a final order of deportation. Section 1228(a)(3)(A) directs the Attorney General to initiate and, “to the extent possible,” complete removal proceedings “before the alien’s release from incarceration for the underlying aggravating felony.” Section 1228(a)(3)(B) immediately cautions, however, that the section “shall not be construed as requiring the Attorney General to effect the removal. . . before release from the penitentiary or correctional institution where such alien is confined.”

Nor is Grant entitled to a final order of removal simply because it may entitle him to deportation parole under Connecticut law. Connecticut General Statutes section 54-125d provides that when an order of deportation has been entered against an inmate by federal immigration authorities, that inmate shall be eligible for deportation parole “after having served fifty percent of the definite sentence imposed by the Court.” Although deportation parole is contingent upon receiving a final order of removal, nothing in the state statute obliges the federal

government to issue such an order. Indeed, the Second Circuit has found that, deportation parole status notwithstanding, the Government is not bound to proceed with removal unless the alien has discharged his state sentence: “Until [a imprisoned alien] is released by the state . . . the pace at which the Attorney General proceeds to take [such alien] into custody and execute the removal order is within his discretion and thus beyond mandamus or habeas review.” Duamutef v. INS, 386 F.3d 172, 180 (2d Cir. 2004). As Grant has not been released from his state term of imprisonment, BICE may schedule his removal proceedings at its discretion.

Based on these facts, the Court concludes that petitioner Grant’s claims are not ripe for adjudication at this time. “Ripeness is a term that has been used to describe two overlapping threshold criteria for the exercise of a federal court’s jurisdiction.” Simmonds, 326 F.3d at 356-57. Constitutional ripeness “prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it.” Id. at 357. In contrast, a case is dismissed as prudentially unripe when “the case will be better decided later and that the parties will not have constitutional rights undermined by the delay.” Id. Grant’s case seems to necessitate dismissal on both grounds: the existence of an “actual case or controversy” required for constitutional ripeness is undermined by several facts. First is that, under most circuit courts’ law, he would not qualify as being in federal custody and therefore his petition would be subject to dismissal for lack of jurisdiction. Second, Grant’s exact release date, though unknown, is still well in the future; even the earliest date upon which he could be paroled (disregarding that the record is devoid of any evidence that Grant would be paroled that quickly) is over six months away. Given that Grant remains in state custody on a valid term of incarceration, he is not entitled to immediate relief under the federal statute he cites,

and therefore lacks a real dispute with the federal departments he names in his petition.

Grant's petition also appears prudentially unripe. His case indisputably will be better decided later, since as the expiration of his term of imprisonment becomes more certain, the actions of BICE could be better subject to challenge. See Simmonds, 326 F.3d at 360 ("There can be no doubt, moreover, that . . . the district court will be in a better position to evaluate Simmonds' claims . . . at a time closer to the moment at which the removal order will exert a substantial adverse effect on Simmonds."). The Court can not find any discernible hardship that Grant will suffer as a result of delaying consideration of his petition.

III. Conclusion

Petitioner's Petition for Writ of Habeas Corpus [Doc. #2] is DISMISSED without prejudice. Petitioner's Motion for Leave to Proceed in Forma Pauperis [Doc. #7] is DENIED.

So ordered this ____31st_____ day of January 2005, at Hartford, Connecticut.

_____/s/ CFD_____
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE